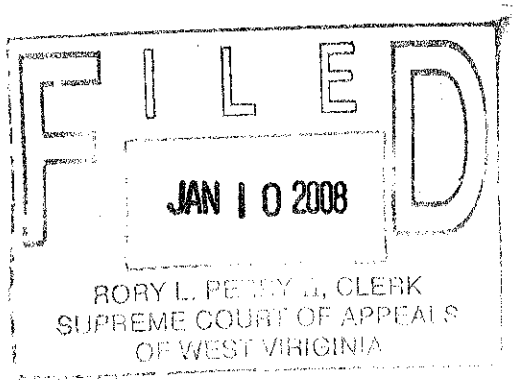
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 33666



BRENDA L. STANLEY,
Plaintiff Below, Appellant

vs.

SUTHIPAN CHEVATHANARAT, M.D.,
Defendant Below, Appellee

APPELLANT'S REPLY TO BRIEF OF APPELLEE

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I. KIND OF PROCEEDING AND NATURE OF RULING IN THE LOWER TRIBUNAL

This has been sufficiently described in prior briefs but it should be pointed out that much of the Appellee's Brief again directs this Court's attention to irrelevant matters. It is irrelevant that the original trial was tainted with error regarding the informed consent issue, which necessitated a second trial. It is also irrelevant that the jury found that Dr. Chevy was not negligent in the actual performance of the surgery. The salient issue is informed consent and the question before this Court is now whether the lower Court erred when it failed to direct a verdict in favor of the Appellant/Plaintiff -below at the close of the evidence.

II. STATEMENT OF FACTS

The facts have been extensively set out by the prior briefs; however, the misguiding nature of Appellee's brief must be addressed.

Appellee's contentions of inaccuracy in Brenda Stanley's brief are wholly unsupported. Brenda Stanley's history of receiving HRT prior to Dr. Chevy's involvement in no way changes the ultimate conclusion one must draw from the evidence that is present in this record.[1] Indeed, Dr. March (Appellee's expert) did not know what Dr. Chevy had actually done as far as changing the HRT regimen for Brenda Stanley. He testified that "another adjustment occurred with Dr. Chevy, when he took over, and that adjustment, and there may have been two, but at least his one or two, whichever the number was, adjustments resulted in a resolution of this abnormal bleeding." (March Testimony Page 145).

Appellee's discussion regarding the issue of a fibroid tumor is yet another attempt to divert attention from the paramount issue in this case. It is un-rebutted that a fibroid tumor is

[1] Curiously, Appellee's Brief does not cite the record in support of his claim that he manipulated Brenda Stanley's HRT. The fact is he only made two changes to her HRT regimen and one change was only a month prior to Dr. Chevy's decision to perform surgery. This is but one reason HRT should have been offered as an alternative to the highly intrusive surgery Dr. Chevy decided to perform.

usually benign and not a sufficient reason to perform a total abdominal hysterectomy (See: Dr. Chevy Trial Test. Pp. 217, 228). It does not matter that Dr. Chevy wasn't responsible for reading the radiological evidence regarding the tumor or that he utilized a consent form that was generally accurate, or that he discussed the items *contained on that form*. (See Appellee Brief 6, 7 & 8). Even though Dr. Chevy actually performed some tasks within the standard of care, he did not offer the continuation of the hormone replacement therapy, which his own expert testified was negligent.

Appellee's recitation of discussions Dr. Chevy had with Brenda Stanley is limited only to the consent form. (See Pg. 9 of the Appellee Brief). Curiously, Appellee's Statement of Facts actually supports the bottom line here: that Dr. Chevy should not have given surgery as the only treatment option. Appellee cites Dr. Dein's testimony that Dr. Chevy was within the standard of care to HRT *but only up to the point where he performed the surgery*. (Appellee's Brief Pg. 10). It is also a misstatement in the record that Dr. Chevy "offered" Mrs. Stanley surgery as an option. (See Appellee's Brief Pg. 10). Dr. Chevy planned the surgery because he thought it was *needed*. If something is needed, it is not an option. (See: Chevy Test. pp 224,225).

The Appellee again attempts to paint the facts contained in the record to support an argument that the issue that the issue of negligence was a jury question. However, a true review of the record in no way supports that. Again, Appellee's expert, Dr. March, testified that Dr. Chevy did not deviate regarding informed consent *only* when asked a question without foundation. His passing referral to an obscure Swedish study (not in evidence) certainly did not change his opinion that HRT should have been offered and discussed. (See Appellee's Brief Page 11). There can be no interpretation other than the plain meaning of the following testimony:

Q. In order for a patient to make an intelligent and informed choice about a course of treatment, whether to have a total abdominal hysterectomy and we are talking *about Ms. Stanley of course*, would a doctor have to necessarily have to present this HRT as an alternative to the surgery?

A. Sure.

Q. So that is something that Dr. Chevy would have talked to *her* about prior to the total abdominal hysterectomy in order that *she* would have informed consent or give informed consent. Correct?

A. Sure.

(Dr. March testimony, Page 164)(emphasis supplied).

Q. If all these things that I've talked about, the alternatives and weighing the risks and benefits, if that is not given to the patient, you do not have informed consent. Correct?

A. Correct.

Q. That would be a deviation from the standard of care and that would be negligence?

A. Yes, sir.

(March Trial testimony, Page 170-172).[2] Therefore, when a foundation was laid, it is clear that Dr. March opined that HRT should have been offered *in Brenda Stanley's case.*

The evidence in this record is best summarized by the Rule 50 Motion made by the Plaintiff below at the close of the evidence:

Q. THE COURT:

We're back on the record. Mr. White, you say you have a Motion?

[2] It is apparent from Appellee's Brief that Dr. Chevy concedes that he did not offer HRT as an alternative method. Appellee is over-reaching for a question of fact that does not exist pertaining to whether HRT was a viable alternative that should have been presented to Brenda Stanley. There is simply no question of fact to reach in the record.

A. MR. WHITE:

Yes, your Honor.

Q. THE COURT:

Okay.

A. MR. WHITE:

Judge, the plaintiff at this time would move pursuant to Rule 50 of the West Virginia Rules of Civil Procedure for Judgment as a Matter of Law on the issue of standard of care, limited to the issue of the standard of care.

Unquestionably, Judge the two (2) experts that testified in this case, both Dr. Dein earlier today and Dr. March who just left the courtroom, testified that the offering of HRT was an acceptable alternative method. They both unquestionably testified today that not offering the continued HRT therapy, as an alternative to the total abdominal hysterectomy would be a violation of the standard of care. I think Dr. March said it would be a deviation of the Standard of Care just moments ago.

Dr. Chevy unquestionably testified yesterday that he did not offer HRT as an alternative method. He also testified, and I think I asked him more than once, one of the reasons he didn't offer it, including stopping the Estrogen or the Premarin, was that her menopausal symptoms would come back, but regardless of whatever reason he didn't offer it, he did not offer it. Both experts, including Mr. Robinson's expert, unequivocally said that would be required to meet the standard of care on informed consent. Therefore, Judge, reasonable minds can't differ. There is no evidence to the contrary. The experts agreed on that, and we believe we ought to be granted a directed verdict on the issue of standard of care.

The issue of causation or whether or not a reasonable person would have refused had it been otherwise, would have refused a hysterectomy, I do believe should be submitted to the Jury.

...

MR. WHITE:

> Your Honor, with all due respect to Mr. Robinson and his memory, I made specific note of this. It was the primary focus of my cross examination of Dr. Chevy, and he said, I believe more than once, but he absolutely said I never offered the HRT. I don't believe he said, again with all due respect to Mark, what Mark just said, also, that it's automatically discussed under the surgical part of the informed consent. It clearly is not on the form which was relied upon heavily by the defense throughout this trial. Again, both experts agree. I know he didn't say anything about that. The record will speak for itself, Judge, but Dr. Chevy admitted he did not offer that.

The Court found (erroneously) that " ... there is evidence in the record the reasonable inference from which could allow the jury to conclude that Dr. Chevy did not deviate from the standard of care in discussing the alternatives from surgery with Ms. Stanley, so the Motion for Directed Verdict would be respectfully overruled, exception noted." (Trial Transcript Page 175-178).

After the jury deliberated for approximately six (6) hours, the following dialogue occurred between the jury and the Court:

JUROR ERNEST WOODS:

Q. The other question, your Honor, is if we answer yes to one and two we are not obligated to put an amount on number three?

THE COURT:

A. The amount of damages, if any, is within the discretion of the Jury. I can answer that for you.

JUROR ERNEST WOODS:

Q. Thank you, your Honor.

THE COURT:

A. Other than the parts of the verdict for that are already filled in as the economic damages, the past medical expenses and future medical expense. You can return to the Jury Room and I'll-

JUROR ERNEST WOODS:

Q. Which both sides have agreed to?

THE COURT:

A. They stipulated that those are the amounts. The past medical bills would be medical bills that Mrs. Stanley has incurred up to today and the future medical bills, based upon the stipulation, is what is going to be the cost of her medications in the future. That's an agreed upon amount.

JUROR ERNEST WOODS:

Q. Have these been paid, your Honor?

THE COURT:

A. Well that's not for you to worry about one way or another. It goes on the medical bills incurred or that will be incurred. Whether they have been paid is not for you all to worry about.

After the Court answered the Jury's question and deliberations continued, the Plaintiff below again asked the Court to find as a matter of law that negligence had been proven:

MR. WHITE:

Judge, again, to vouch the record, we believe that question Number One should not have been submitted to the Jury. We moved at the close of defendants evidence pursuant to Rule 50 that because Dr. Chevy testified that he never offered Hormone Replacement Therapy as an alternative method, and because both experts, Dr. Dein and Dr. March, testified in their expert opinions that a failure to offer Hormone Replacement Therapy as an alternative method would be a deviation from accepted medical care, and indeed negligence, we don't believe there is a question of fact that reasonable minds could differ and that question

should not have been, that question Number One, therefore should not have been submitted to the Jury.

Q. THE COURT:

Alright, I understand your position.

(See Trial Trns. Third Day pg. 99).

III. ASSIGNMENTS OF ERROR

The lower court erred when it refused to enter judgment as a matter of law that the standard of care was breached and Dr. Chevy was negligent in failing to obtain informed consent. The Trial Court should have ruled that negligence had been proven and only submitted the jury a special interrogatory on the issue of causation, and allowed it to assess damages in the event it decided that a reasonable person would have refused the surgery had the standard of care been met regarding informed consent.

IV. DISCUSSION OF LAW AND RELIEF PRAYED FOR

A. THE COURT SHOULD APPLY THE *DE NOVO* STANDARD OF REVIEW TO THE CIRCUIT COURT'S DECISION TO NOT GRANT JUDGMENT AS A MATTER OF LAW.

The appellate standard of review of a Motion for Judgment as a Matter of Law pursuant to Rule 50 of the *West Virginia Rules of Civil Procedure* is *de novo*. *Pipemasters, Inc. v. Putnam County Commission*, 625 S.E.2d 274 (W. Va. 2005).

B. THE COURT ERRED IN FAILING TO GRANT JUDGMENT AS A MATTER OF LAW ON THE ISSUE OF NEGLIGENCE.

The standard for a Rule 50 Motion under the *West Virginia Rules of Civil Procedure* has been previously set out. Nothing in Appellee's Brief sufficiently rebuts the clear record in this case that the evidence falls within the scope of Rule 50. There is simply no evidence present in

the record to validate the jury's decision.[3]

Appellee's Response Brief presents a rambling, miscalculated view of the record in this case. Even though Appellant's Brief distinctly sets out the only logical conclusion that can be reached, this reply addresses the major flaws presented by the Appellee.[4]

Curiously, the facts of *Yates* are not addressed by Appellee. That is obviously because the record in *Yates* clearly included evidence that created a question of fact. Certainly that is not the case here where the record contains no conflicting testimony. A reading of *Yates* actually supports the conclusion here by implying very strongly that where there is no conflicting testimony, a Motion for Judgment as a Matter of Law should be granted. *Yates v. West Virginia University Board of Trustees*, 549 S.E.2d 681 (W. Va. 2001).

Appellee states that Appellant's argument is that "the jury's decision should be taken away." (Appellee's brief pg. 15). That is not the issue here. The prevailing argument (which has now been stated time and time again) is that the jury should not have been submitted the question of negligence because there was no evidence creating a question of fact on that issue.

Somehow Appellee continues to assert that Dr. Chevy considered and discussed HRT as an alternative treatment to surgery. The only response to this that can be made is simply to again point to the black letter of the word contained in the transcript. Dr. Chevy did not offer HRT because he thought it would not work. He decided to perform the surgery and testified that he

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[3] The Jury obviously concluded that the plaintiff had proven her case, but for some inappropriate reason, outside the evidence, did not wish to award damages. This is evident because the Jury asked the Judge whether her agreed upon medical bills had been paid, which is referred to *supra*.

[4] For instance, many cites to the record are contained in the Legal Argument and Authority presented by Appellee. Obviously these cites to the record should be contained in the Fact Statement. Appellee's presentation takes testimony out of context and makes for a confusing review. This reply attempts to avoid this error by referring only to the salient facts that actually apply to the issue at hand, which, by in large, were cited in the facts section of the original brief.

thought the surgery was *needed.* If a treatment is needed, then there are no alternatives to consider.

Appellee is also mistaken in his application of *Cross v. Trap*, 170 W.Va. 459, 294 S.E.2d 446 (1982). He goes to great length to attempt to persuade this Court that the *Trapp* standard includes *what would have happened* had Brenda Stanley not had the surgery, as if a patient is left to the peril of any consequence when a physician gives her no choices. (Appellee Response, pp. 15-17). This simply is not the law. In *Trapp,* the plaintiff was unhappy that a surgery was performed even though no specific consent form was executed for the procedure. However, a consent form was signed by the patient regarding the procedure (prostrate issues) to be performed and included the *possibility* of surgery. Moreover, testimony included that the physician discussed the possibility of the surgery with the patient, who consented to it if it became necessary. The surgery occurred because, while the physician was conducting a planned test, he determined that it was needed.

Nowhere in the *Trapp* opinion does it even imply that informed consent can be met based upon *what would have happened* had a particular surgery not occurred. Of course, informed consent is not met unless the physician fully describes and offers alternative methods of treatment and imparts knowledge to the patient regarding the risks of the treatment and alternative methods of treatment, among other things. *Id.* It matters not what would have happened had Brenda Stanley refused the surgery (a choice not given to her). What carries the day here is that Dr. Chevy never offered HRT as an alternative method, but rather, boldly stated to Brenda Stanley that the surgery was required because he thought it was the only treatment available (i.e.: that it was needed). Unlike in *Trapp*, there is no conflicting evidence here that should have given the Jury an opportunity to return the erroneous verdict.

Nowhere in the record does it show that Dr. Chevy offered HRT to Brenda Stanley as an alternative treatment. Dr. March's testimony on the issue of negligence is a fatal blow to Appellee's reasoning.

Appellee's continued effort to convince this Court that the Rule 50 Motion should not have been granted by continually referring to questions limited to the consent form again misses the mark. There is no debate that discussions and explanations beyond the form are required in order to meet the *Trap* guidelines.

Appellee next claims that Dr. Chevy did not admit the matters that are crucial to this Court's decision. All Appellant can do is, again, point to the transcript in which Dr. Chevy flatly stated that he did not offer HRT because he believed it would not work and that he thought the surgery was necessary. It does not save the day for Appellee to attempt to undo this by pointing to matters in the record that are limited to the consent form.

Finally, Appellee's Brief contains no substance regarding *Yates v West Virginia University Board of Trustees,* 549 S.E.2d 681 (W.Va. 2001), and for good reason. It is simply incorrect to attempt to argue that the case before this Court is analogous. In *Yates,* this Court upheld a jury verdict in favor of the defendant where there was conflicting testimony regarding different methods of treatment for blood clots in the patients' iliac artery. Although surgery was an option, the physician decided to employ interventional radiology (angioplasty and stents). After the procedure, clots formed in the microscopic vessels of the right foot and amputation became necessary. Expert testimony at trial *was conflicting* and opinions supported the defendant physicians' decision to use the chosen method. *Id.* That in no way compares to the record here where there is no evidence supporting a jury question and Appellee's own expert establishes that negligence occurred.

When the record fails to establish a legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue a Motion under Rule 50 should be granted. See, *E.g.: Yost v. Vascaldo*, 408 S.E.2d, 72 (W. Va. 1991). The case before this Honorable Court is a rare occasion to exact such justice on behalf of a plaintiff that rightfully deserves such a ruling.

C. A NEW TRIAL SHOULD BE GRANTED ON THE ISSUE OF CAUSATION

Appellee's enigmatic approach to this issue flies in the face of Rule 59(a) of the *West Virginia Rules of Civil Procedure* and case law. Obviously, the jury did not address the issue of whether a reasonable person under like circumstances would have refused a total abdominal hysterectomy. *Cross v. Trapp*, 294 S.E.2d 446 (W. Va. 1982). The jury did not consider that issue because of the erroneous decision on Appellant's Rule 50 Motion and the verdict on the issue of negligence. Clearly, under the law, a new trial can be granted on a single issue, which is what justice requires here. Where liability has been resolved in favor of the plaintiff, a new trial may be granted on the single issue of damages. *Gebhardt v. Smith*, 420 S.E. 2d 274 (W. Va. 1992). Of course, liability was proven in this case but requires action by this Honorable Court to correct the error committed below. The Appellee may yet defend his position when the matter is remanded to the Circuit Court of Logan County for a trial on causation and damages.

D. PRAYER FOR RELIEF

Based upon all the foregoing, your Appellant respectfully prays that this Honorable Court reverse the decision of the Circuit Court of Logan County, West Virginia and enter an Order

granting judgment as a matter of law on the issue of negligence and granting a new trial on the issues of causation and damages.

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CERTIFICATE OF SERVICE

This is to hereby certify that on this the 10th day of January, 2008, the undersigned served a true and exact copy of **"Appellant's Reply to Appellee's Brief,"** by U.S. Mail, postage properly paid upon the following:

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